No. 16388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

APPELLEE'S BRIEF.

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Preliminary Statement.

Appellant's "Statement of the Case" and its version of the evidence throughout its brief are so incomplete and incorrect, and its treatment of the evidence so contrary to settled principles governing presumptions, intendments and inferences in favor of the findings, that Appellee is obliged to submit its "Statement of the Case"[1] Rather than interrupt the continuity of Appellee's Brief by referring to the many misleading and inaccurate statements in Appellant's Brief, Appellee will set forth the proven facts in detail.[2]

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[1]*Cf. United States v. Hill Lines,* 175 F. 2d 770, 771 (5th).

[2]The facts stated are those which support the trial court's findings as commanded by Rule 52(a); see Appendix A, pp. 1 to 5.

Statement of the Case.

The case was submitted for decision upon the Second Amended Complaint [R. 57], and the answer of City of Los Angeles to the Amended Complaint [R. 8] as implemented by a stipulation that new matter in the Second Amended Complaint was deemed denied except as admitted or affirmatively alleged in the answer to Amended Complaint [R. 80, 99-100]. Originally, other parties were involved, but during the trial they were dismissed by stipulation [R. 99-100, 233-235].

The case was tried to the Court, which rendered its opinion ordering judgment for defendant (168 Fed. Supp. 344). Subsequently the Court signed Findings of Fact, Conclusions of Law and Judgment [R. 99].

On March 12, 1956, and for many years prior thereto, the Harbor Department of the City (a virtually autonomous department)[3] operated a transit shed at Berth 59, Pier 1, at Los Angeles Harbor [R. 100]. Pier 1 extends southerly and seaward from 22nd St. about 2,400 feet into the harbor waters. In the middle of Pier 1 was Signal St., and to the west were Berths 57 to 60. Westerly of these berths was the East Channel of the harbor. The location of these berths and the orientation of various structures to Signal St. as of March 12, 1956, are delineated on Exhibits I and U [R. 251-256; 430-432].

Early in the morning of March 12, 1956, an 8 inch cast iron pipe burst, flooding the floor of the transit shed at Berth 59 and damaging coffee in the shed, presumably owned by Appellant [R. 103]. This pipe was installed between 1914 and 1916 by the *Harbor* Department. It was buried about 9 to 10 feet underground and under

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[3]See Appendix B, pp. 7 to 8.

a concrete loading dock, which was covered with a compacted dirt fill [R. 105]. The pipe burst as a result of graphitic corrosion [R. 465].

Continuously since 1914 there had been maintained under Signal St., commencing northerly of 22nd St. and extending to the southerly tip of Pier 1, a 10 inch water main operated by the Water and Power Department of the City, another autonomous department.[4] This 10 inch line consisted of 5,244 feet of cast iron pipe which was laid by the Water Department in 1914. The Water Department had had no failures in this pipe from corrosion between the time of its installation in 1914 and March, 1956. The Water Department's line was the same type of pipe as the Harbor Department's which burst [R. 256-258; Ex. K].

Paralleling the Water Department's 10 inch main is an 8 inch main installed and maintained by the Harbor Department. This main commences about 200 feet south of 22nd St. and continues southerly thereon to 200 feet north of the south end of Berth 60; the 8 inch Harbor Department main is connected at three places with the Water Department's 10 inch main [R. 179]; the 10 inch main supplies the 8 inch line with water [R. 182].

It was stipulated that the sole purpose for which this 8 inch main and the system served by it was used was for fire prevention [R. 183], and the Court so found [R. 101]; the water in this system was not even used for toilets, washrooms or drinking fountains [R. 435].

At each of the three connections between the 10 inch main and the 8 inch main there was a check valve through

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[4]See Appendix B, pp. 7 to 8; this department is hereafter called the "Water Department."

which a large flow of water could pass. Bypassing each check valve was a ¾ inch Detector meter installed for the purpose of detecting a small flow of water in the event someone tried to steal the water or use it for other than fire prevention purposes. These detector meters belonged to the Water Department and were read by it—not by the Harbor Department [R. 185-187]. There were many laterals or service leads from the 8 inch main into the various buildings located on Pier 1, all of which are shown on Exhibit U. The detector meters are indicated on Exhibit I by the markings "A-2," "A-3" and "A-4" [R. 255]. The pipe that burst was the more northerly of the laterals leading from the 8 inch main to Berth 59 [see Ex. U].

The loading platform under which the pipe burst was 3 or 4 feet above the level of Signal St., had a concrete floor, and was on the street side of Berth 59. It was *not* in or under Berth 59 [R. 188-189, 390].[5]

Immediately upon locating the leak, Brashier (the Harbor Department's plumber foreman) removed the damaged section of pipe and inserted a new section. He inspected the remaining pipe in the area and found it was good. The removed section was about 6 or 7 feet long; it was soft, as the iron had been removed from it, and there was a hole in it about the size of one's hand [R. 190-194; 434].

From 1919 until the time of the break there had been no changes or alterations in the lateral leading off the 8 inch line into Berth 59 [R. 428]; the hole in the burst

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[5]Throughout Appellant's Opening Brief (pp. 2, 4, 11, 17, 42, 43, 54, 55) it is incorrectly asserted that the pipe which burst was inside or under the transit shed at Berth 59.

pipe was on the down side and, if one had dug up the earth and exposed the pipe halfway, he would not have been able to see the hole [R. 433].

Prior to this break, there had been but one corrosion failure of Harbor Department pipe in the area, which occurred about 1926 [R. 435]. It was under a warehouse designated as "Municipal Warehouse No. 1" on Exhibits I and U [R. 436]. There was no evidence whether this was a graphitic corrosion failure, or a corrosion of some other type [R. 449]. At the date of the bursting, the Harbor Department maintained in excess of 55,368 linear feet of 6, 8 and 10 inch underground cast iron water pipe, of which 8,298 feet had been installed in 1917 or prior thereto; the pipe in question was installed in 1916 [R. 424; Ex. S]. In this 40 year period the only corrosion break in the entire system of more than 10 miles of pipe was the one under Municipal Warehouse No. 1 [R. 436-437].

The Harbor Department's pipes were sand cast pipe, which was the approved technique at the time they were made; in the process of manufacturing, the molten sand forms a hard, protective skin surface. If the skin is broken in transit or in installation, corrosion may start, but ordinarily such damage would not be observable by the naked eye [R. 247-249]. There is no evidence that the pipe in question was damaged either in transit or installation [R. 438].

There is no connection between the Water Department and the Harbor Department; the Water Department exercises no jurisdiction over pipe installed by the Harbor Department [R. 253, 258]. None of the Water Department studies as to soil corrosivity were reported to the Harbor Department, and leaks in Water Department lines

were not reported to the Harbor Department [R. 262, 284-285].

There is no known practice to dig up water pipes for the purpose of inspecting them to see if they should be replaced; the cost would be prohibitive; merely digging a test hole and finding a pipe in good condition would be no indication of what the pipe might be like a few feet removed; there is no practice to dig up water pipe unless something is suspected to be wrong; in the absence of trouble, pipes are replaced only because of obsolescence, *e.g.,* the pipe is too small and the fire department wants more water in the area, or there has been a section of line with recurring leaks. The City of Philadelphia has cast iron pipe in use for 150 years and it is not being dug up to be replaced. When this pipe was installed in 1914 it was the best pipe on the market; at this time very little was known about soil corrosivity [R. 259-265]. The Water Department never digs up or discards pipe merely because it is in corrosive soil, in the absence of trouble [R. 271].

The burst pipe was examined and, although it had lost its iron content and strength, *it retained its full wall thickness and shape;* visual inspection would not disclose that graphitic corrosion was occurring [R. 261-262; 273].

Graphitic corrosion does not develop a uniform pattern; even in the same area one spot will be corrosive and another will not; even inland a high degree of corrosivity is experienced in some areas [R. 262-263]. Exhibit 28-A shows high corrosivity in some areas adjacent to the harbor but in other areas abutting Fish Harbor corrosivity is either mild or slight.

Although one can tell that graphitic corrosion has occurred by scratching the pipe or hammering on it, to de-

termine whether a pipe line has been subjected to graphitic corrosion it would be necessary to open the entire line and examine *every inch of the pipe* because there might be corrosion one place, yet ten inches away the pipe would be all right; to examine it carefully one would have to look at it on top, bottom and both sides. Even in highly corrosive soil, cast iron sometimes lasts for many years [R. 276-277].

Although the Water Department had corrosion failures on 22nd St., such pipe was laid in 1934 and was a *metal molded* pipe—not a sand cast pipe as was the Harbor Department's pipe. A sand cast pipe holds up much better than metal mold. The Water Department's 10 inch line down Signal St. was also sand cast [R. 288-289].

Appellant's witness, Montgomery, testified hypothetically[6] that in his opinion the pipe involved should not have been permitted to remain in a highly corrosive soil from 1914 to 1956 [R. 304-305]. He said the situation was unlike a cast iron main laid under a street, where a break in the line would cause mainly inconvenience; but that in a building or warehouse where goods might be damaged he felt a short length of pipe should be replaced, and it should have been replaced as soon as they knew it was in a corrosive soil. Pipe subject to graphitic corrosion doesn't leak; it just breaks and a flooding occurs [R. 305].

On cross-examination, Montgomery testified he knew of a "hot" area in Belmont Shores where they had a great deal of trouble from graphitic corrosion and they replaced it with a different pipe [R. 306]. When he worked in

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[6]He incorrectly assumed that the burst pipe was *under* the transit shed [R. 304-5].

San Diego, where there were "hot" areas, he did not know of any pipe being torn up. He was advisor to the City of El Centro and the City of Las Vegas, where they had "hot" areas, but he did not advise them to replace their pipe; he didn't know the age of it [R. 308-309]. In Las Vegas, when a corrosion break occurred, they replaced enough of the pipe to remove the bad part but left the rest in. He thought this was consistent with sound practice [R. 311]. His only experience with the pipe in this action was when one of Appellant's attorneys, a couple of weeks before the trial, pointed the area out to him and he identified the place of the break as being:

> ". . . where the elbow on the cast iron service line bent up to come into the building, where it came under the floor and up into the building."[7] [R. 312.]

He did not know whether the burst pipe was a vertical or horizontal piece [R. 312]. He did not know how deep the pipe was buried [R. 312], and he thought a pipe would not be laid deeper than four or five feet [R. 314] and, if the pipe had been in the street rather than near the loading shed, he would not think of replacing it [R. 315]. He felt the danger point was where the pipe went under the loading dock; he would not replace it if the escaping water would not be likely to cause damage but would just wait until it broke [R. 315-6]. He has never replaced or recommended replacing a water main in the street, but only when it was going into important buildings—meaning by that, "where the water comes into a building" [R. 316].

A graphitized pipe doesn't leak—there is a deluge when it gives way [R. 316]. In only one instance has he ever

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[7]Of course, this is not where the pipe broke.

recommended the removal of a pipe before a breakdown [R. 317]. He thought the pipe that broke was close to the wall of the transit shed, probably within eight inches [R. 321], but admittedly he had not seen the shed until just before trial [R. 312, 321]. And the break was not under the building but under the loading platform [R. 390]. He conceded that cast iron pipe is erratic in its behavior; he has known of cast iron pipe in "hot" ground that gave no trouble for many years and others that graphitized very rapidly; in many instances they just take out an affected section and replace it with a new pipe and get many more years service, *and that is the general practice.* He also said he had managed a water company that had cast iron pipe that was laid in "hot" soil in 1852, and they replaced short lengths of it but the rest held up quite a while and some of it was still in service at the time of the trial [R. 326-327].

On cross-examination, he conceded that the Las Vegas main that was replaced was just enough new pipe to take care of the defective section that was removed; this was not a service line but was a main in the street [R. 327]. *He knew of no instance where service lines were replaced;* there was one instance where he recommended it, but his recommendation was not followed [R. 328].

Appellant's witness, Brennan, testified that in June, 1956, he took three soil samples underneath Berth 59 and a sample from Signal St. [R. 334]. He made "Corfield" corrosivity tests of these samples. [R. 335.] The samples taken from inside and under Berth 59 had a high corrosivity index [R. 336]. He estimated the life of cast iron pipe in soil having a high corrosivity as 25 years, but conceded there is no precision to such an estimate

and that there is a great variance in the soils and the action of pipe to them [R. 339].

On cross-examination, Brennan admitted he knew of cast iron *gas* mains that had been in service for as long as 50 years [R. 352]. As to pipes in service for more than 50 years, he had assigned a remaining life value to them for rate making purposes [R. 353]. He also admitted that by his direct testimony he did not mean to infer that because pipe had been in the ground 25 years he would junk it [R. 354]. In working for P. G. & E. with gas pipes, he found they had to be safer than water pipes as escaping gas is more dangerous [R. 358]. In the San Francisco Bay area the P. G. & E. cast iron gas mains had been in service a very long time, some of them going back as far as 1890 in areas favorable to the survival of cast iron [R. 358-359]. For rate making purposes, even pipe installed in 1890 is ascribed a remaining life value [R. 361-362].

During the past 12 or 14 years he was employed by the P. G. & E. as Supervisory Evaluation Engineer [R. 366]. In all his experience in replacing cast iron water pipe, Brennan knew of no instance where it was replaced merely because of passage of time and prior to a breakdown [R. 368-369]. This is particularly true of water systems where the pressure is low and the hazards are not high. With water pipe, he has never recommended replacement before there was an indication of failure, because it is too costly to dig the pipe up and replace it [R. 369].

Never in his experience have they dug up a water pipe to look at it in advance of an indication of trouble, such as water in the street or on adjacent property [R. 378-379]. He knew of no instance where a rate making body

ever permitted a public utility to claim as short a life as 25 years for cast iron water pipe, or that merely because pipe had been in the ground for 30 years it was valueless and should be replaced for rate making purposes, or that the pipe would be charged off as valueless merely because of the passage of time [R. 382].

He also admitted that every small earthquake disturbance causes leaks in joints [R. 386].

The earth samples he took from Berth 59 were taken through a hole in the floor of the shed where the concrete had collapsed, about three or four feet below the surface [R. 389].[8]

On Brennan's test No. 2 (which he did not mention on direct examination) he got a very low corrosivity rating. He attempted to explain this by saying that the sample furnished for test No. 2 was not the right quantity of soil; *but this sample was a soil quantity given him by plaintiff's attorneys just two days after the break.* It was not until after he made this test that he told plaintiff's attorneys he could not use the sample [R. 392-393]. This sample was taken from the very area where the pipe burst [R. 394]. The sample from out in Signal St. also had a low corrosivity rating [R. 394]. All five of his test sheets were introduced in evidence as Exhibit M. The test from the Signal St. sample, which also had a low corrosivity rating, he considered not to be indicative of the soil at the place where the pipe burst; the higher readings from inside the shed he considered indicative because they were closer [R. 398].

It is clear from the foregoing why the trial Court ignored Brennan's testimony concerning his soil tests.

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[8]The burst pipe was 9 to 10 feet below the surface [R. 105].

Brennan knew that the Internal Revenue Service prepared a Bulletin F showing, for tax purposes, the life of cast iron pipe. Bulletin F [Ex. N] allows for tax purposes an average life of 75 years for 8 to 10 inch cast iron pipe [R. 403-405].

He also stated he had heard that cast iron pipe in Versailles, France, had been in service more than 100 years [R. 407].

He "explained" why the Water Department pipe on Signal St. had lasted since 1914 without a corrosion break [R. 256-258] by saying he thought the soil in the street was less corrosive than the soil under Berth 59, and that perhaps drainage conditions were different or more favorable [R. 408-409]. He did not know where the soil conditions changed which would cause them to get a high or low corrosivity reading [R. 409]. He also conceded that if he made a soil test and found a Corfield reading of 2.8 on Signal St. and no surface graphitization of the pipe, he would *not* recommend it being replaced even though it had been in for 25 years [R. 409-410]; and his answer would be the same with reference to the lateral off of the 8 inch fire line [R. 410]. In examining a pipe, he would be satisfied just to see the top or upper half of it for a longitudinal length of about two feet [R. 411]; he would also tap it with a chisel and measure the extent of graphitization; then would form a judgment as to the probable expectancy of the pipe [R. 412].

This pipe was the best made at the time and it completely retained its shape, which is one of the characteristics of graphitic corrosion [R. 416].

Even with recently installed new pipe, breaks occur from corrosion in as short a time as two years [R. 417].

The City's witness, Alderman, a Civil Engineer experienced in design, maintenance and installation of cast iron water mains and systems [R. 454 *et seq.*], made a pressure test of a portion of the 8 inch pipe that was removed from the area where the break occurred. He built a watertight chamber of a small section of the pipe and subjected it to water pressure [Ex. G-3; R. 459]. The pipe did not fail until subjected to a pressure in excess of 500 pounds per square inch; it then ruptured longitudinally [R. 47]. This was more than 7 times the normal working pressure, which was about 65 pounds per square inch [R. 461-463].

Graphitic corrosion is a type of electrolysis in which a circuit is set up in the cast iron and the iron is removed, leaving only a carbon shell. One cannot tell by looking at the surface whether pipe has been subjected to graphitic corrosion [R. 465-466].

In his opinion, reasonable waterline maintenance practice would *not* require digging up cast iron pipe in a highly corrosive soil from time to time, before any trouble had developed in the line; there was no method by which a person could from the surface detect trouble in a buried pipe; the only way to inspect it would be to uncover it and look at it. It is hazardous to uncover any appreciable amount of water pipe because there is a risk of disturbing it structurally and setting up dangerous stresses [R. 466-467].

When this pipe was installed, cast iron was the best pipe available [R. 467]. Cast iron water pipe has been in service in many instances for over 100 years [R. 468]. Many water systems in Southern California have installed unprotected cast iron pipe in corrosive areas [R. 470].

On a corrosion break the leak usually develops very fast [R. 476]. In a fire line consisting of 5,000 to 6,000 feet of pipe, containing a leaded joint every 10 feet and 36 test valves which were turned on periodically to check the system, a leakage of 100 cubic feet of water per day for several months prior to the break *would not be any indication that the pipe which gave way was leaking.* In fact, a system with that many valves would be unusual if it did not leak [R. 477].[9]

Detector meters merely show that water has gone through them. They are not an accurate measure of water consumption [R. 479-480]. In a dead end system, such as the one here in question [R. 445] where the pipes have no outlet, water can flow back and forth through the detector meters due to changes in air pressure at the end of the sprinkler line; and a dead end line would be subject to considerable variation in pressures as valves were opened [R. 480-481].

A reading of 100 cubic feet of water per day through the detector meters would *not,* in prudent practice, require digging up the buried pipe; in the absence of water coming to the surface you would not know where to start to look for a leak [R. 481-482]. The readings on Exhibits 25, 26 and 27, showing water consumption through the detector meters for the three months immediately preceding the time of the break, do not indicate that any water was escaping from the pipe at the place where it burst on March 12, 1956. These readings were not constant,

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[9]This was the system here involved [R. 221-2; 440-7].

but were variable—sometimes increasing, at other times decreasing—whereas a leak at the break would develop so rapidly as not to show on the meters [R. 483-484].

Brashier, the City's plumber foreman, when asked his opinion as to whether any of the water going through the detector meters in the few months preceding the break was escaping through the place where the break occurred, said:

> "I would almost positively say no. A condition of this kind, it is my experience one second it is together and the next second it is gone.
>
> "The Court: It would be your opinion this 100 cubic feet a day escaped from the system at some other location?
>
> "The Witness: Yes, sir, not through this hole." [R. 444.]

Summary of Argument.

I.

PLAINTIFF FAILED TO PROVE THE CITY WAS NEGLIGENT IN THE MAINTENANCE OF ITS PIPE LINE.

II.

THE PIPE LINE SYSTEM WAS USED SOLELY FOR FIRE FIGHTING PURPOSES—A GOVERNMENTAL FUNCTION—AND PLAINTIFF FAILED TO ESTABLISH THE REQUISITES FOR LIABILITY, EVEN ASSUMING THAT NEGLIGENCE EXISTED. ACCORDINGLY, GOVERNMENTAL IMMUNITY ATTACHES.

III.

THE EXCULPATORY CLAUSE IN THE CITY'S TARIFF EXONERATES THE CITY FROM LIABILITY EVEN THOUGH NEGLIGENCE WERE ESTABLISHED.

IV.

THE ADMISSION OF THE CITY'S "ADDITIONAL" ANSWER TO PLAINTIFF'S INTERROGATORIES WAS NOT ERRONEOUS OR PREJUDICIAL.

ARGUMENT.

I.

Plaintiff Failed to Prove the City Was Negligent in the Maintenance of Its Pipe Line.

In considering the trial court's Findings, we bear in mind the provisions of F. R. C. P. 52(a) and the presumptions, intendments and inferences which we are entitled to draw from the record in view of such Findings. Consistent therewith, we ignore conflicts in the evidence.[10]

We do not agree, as frequently asserted by Appellant, that the Harbor Department adopted a "do nothing" policy concerning inspection and replacement of its water lines. It is true that the trial court's opinion, removed from its context, uses the phrase "do nothing" with respect to inspection—but not as to "replacement" (166 Fed. Supp. 348). And this was not in the Findings, which are not to be impugned by expressions in opinions.[11] Appellant's oft-cited statement that the City's decision not to dig up or inspect buried pipe was based upon "economy" (App. Op. Br. 64, 67, 69) or "economic grounds" (App. Op. Br. 71) is not supported by the record. The policy is stated in Finding 11 [R. 102].

Appellant cites no authority discussing the duty imposed upon a person maintaining underground water mains to inspect or replace the same. But there are many such decisions and they are in accord in declaring that no duty rests upon the owner of a buried water main to dig it up to inspect it (merely because of its age) prior to some indication that the main is failing. The leading

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[10]See Appendix A, pp. 1 to 5.

[11]*Plastino v. Mills,* 236 F. 2d 32, 35 (9th); *Brooks Bros. v. Brooks Clothing,* 5 F. R. D. 14, 17 (D. C. Cal.).

California case is *Williams v. Long Beach,* 42 Cal. 2d 716, involving damage caused by the escape of *gas* from defendant's main. The trial court found that damage resulted from the escaping gas but that the City was not negligent. The main was installed about 27 years before the accident. In affirming, the Supreme Court held:

> "* * * There was testimony that no practical method was available to test the amount of strain on the pipe without taking it completely out of service and that there was no known practice of testing such pipes for strain while they are still in place." 42 Cal. 2d 718.

That *res ipsa loquitur* may be applicable to a situation such as this becomes immaterial after the cause of the accident has been satisfactorily explained to the trier of fact. This is made clear in the *Williams* case and in *Hardin v. San Jose City Lines,* 41 Cal. 2d 432, 437, where the Court said:

> "* * * This [*res ipsa*], of course, does not mean that the burden of proof shifts from plaintiff to defendant. The defendant has merely the burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it."

Decisions from Massachusetts, South Dakota, Michigan, Pennsylvania, Ohio, Virginia and New Jersey, are to the same effect, namely, that absent proof of faulty installation there is no duty upon a city or utility maintaining a water line to dig up its streets periodically for the purpose of inspecting or replacing water pipe prior to the time that trouble becomes known.[12]

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[12]These authorities are set forth in Appendix C, pp. 9 to 15.

Appellant has never suggested any practical method of testing or inspecting buried pipe. As said by the trial judge:

> "* * * Plaintiff admits, however, there was no reasonable manner in which the line could be adequately inspected, other than to excavate the soil along the pipe line and make physical inspection thereof. * * * It would be necessary to excavate around the entire pipe to locate a corroded area. An examination of the upper half of the pipe would not be sufficient because graphitic corrosion could manifest itself on the lower portion of the pipe and not on the top or sides. To make complete inspection it would be necessary to remove the earth from beneath the line. The removal of earth from beneath the pipe would remove its support, putting a strain upon the pipe itself, and might cause a sinking or bending of the pipe, occasioning damage more extensive than the corrosion itself." 168 Fed. Supp. 344, 348-349.

Appellant's discussion of "Contemporaneous Leakage" (App. Op. Br. 50 *et seq.*) ignores the evidence explanatory of the leakage. There is not a scintilla of evidence that any of the water registered by the detector meters escaped through the pipe at the point where it burst. Hence, leaks in other portions of the system would not be a notice or warning to look for a leak at the place where this break occurred. The check valves which the detector meters bypassed served fire lines from the north end of Berth 57 to the south end of Berth 60, a lateral to a water tank on the roof of Municipal Warehouse No. 1, a lead into the garage between Berths 57 and 58, a lead from service connection No. 8849 easterly across Signal St. to the building called "Auto Repg," two leads extend-

ing easterly across Signal St. opposite Berth 59 into and under Municipal Warehouse No. 2, and two leads opposite Berth 60 extending easterly across Signal St. into and under Municipal Warehouse No. 1. And underneath Berths 58, 59 and 60, there were six 5 inch lines parallel to and connected with the 8 inch main.[13] Water was drawn from this system frequently as a result of turning on check valves, leaks in joints and surges. The plumber foreman testified as to the various ways water would be registered by these meters [R. 440-447]. Appellant read into evidence the City's answer to Supplemental Interrogatory No. 7 wherein the causes for the flow were explained by saying there were 6,000 feet of underground pipe, 600 leaded joints, and that the causes were minor leaks in the joints, leaks in the 36 two-inch drain valves which are sometimes turned on, 36 ¾ inch tests valves, and when testing occurred a flow might be registered, improper seating of the alarm valves, surge in the pressure causing the alarm valves to open, and longshoremen or other persons "skylarking" will turn on the fire hoses for pleasure [R. 221-222].

Appellant's own witness testified that flow of water through these meters would not indicate a leak in the pipe that burst because the pipe would not give way gradually but that a piece would come out of it and a "general flooding takes place" [R. 305]—"You have a deluge" [R. 316].

There is no pattern to the meter readings. The Water Department records [Exs. 25, 26 and 27] show that as far as 1953 fluctuating meter readings obtained. Sometimes they are substantial; at other times trivial; some-

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[13]These leads or laterals are all shown on Exhibit U.

times nothing. There is nothing in the record to show that the pipe in question was dripping or dribbling quantities of water in the months immediately preceding the time it burst or that one should have known by reading the meter statements that this pipe was in a dangerous condition.

Appellant asserts (App. Op. Br. 54) that short lengths of pipe, such as service laterals, could be economically replaced. The service laterals were estimated by Appellant's witness, Montgomery, to be approximately 100 feet in length [R. 322] and he thought there were 3 of them [R. 323]. In fact, there were at least 14 of them [Ex. U] extending in both an easterly and westerly direction from the Water Department's 10 inch main.

Appellant cites (App. Op. Br. 56) *Lawrence Warehouse Co. v. Defense Supplies Corp.,* 164 F. 2d 773 (9th), and *California & Hawaiian Sugar v. Harris, etc.,* 27 F. 2d 392 (D. C., Tex.), to support its assertion that where an accident occurs and there is no evidence that it occurred despite the exercise of due care, a warehouseman is liable. These cases (the facts of which are not cited) have no bearing on this record. There is no evidence that the City was a warehouseman; nor is there evidence of any contractual relation between the City and Grace; nor was the burst pipe in or under the transit shed.

In the *Lawrence Warehouse* case, there was a contract between an admitted warehouseman and plaintiff for the safekeeping of its goods. There is no such status shown between Appellant and the City. Further, the court found that Lawrence Warehouse Co. had been guilty of negligence arising from the use by its agent of an acetylene torch which gave rise to the fire that caused the damage.

In *California & Hawaiian Sugar Corp. v. Harris County,* 27 F. 2d 392 (D. C., Tex.), the court found that defendant was negligent in that it had negligently laid a floor of insufficient strength to withstand weights which it knew or should have known would be placed upon it, as a result of which the floor subsided and broke a water pipe. There, again, negligence was expressly found, viz., negligent installation and maintenance of a floor. Again, we note there is no evidence that Appellant enjoyed the status of a bailee with respect to the City.

It is argued (App. Op. Br. 58) that Water Department maps were available to the Harbor Department. Literally, this is correct, but it ignores the testimony that there was no liaison with or exchange of information between the Water Department and the Harbor Department; the evidence was precisely to the contrary [R. 253, 258, 262, 284-285]. The testimony quoted by Appellant (App. Op. Br. 58-62) is removed from its context and ignores other testimony explanatory thereof. We have stated the context fairly and completely in Appellee's "Statement of the Case" (*ante,* pp. 2-15).

The contention that the knowledge and extracurricular studies of Ashline, a Water Department employee, concerning corrosion are chargeable to the Harbor Department is unrealistic and intolerable when dealing with a complex multi-departmentalized instrumentality such as a metropolitan city. Such contention was made and rejected in *Stein v. City of Newark,* 52 A. 2d 66 (N. J.), where plaintiff told the Building Department of the leakage but such information was not called to the attention of the Water Department until sometime later. In granting a motion for directed verdict, the Court held:

> "As I have already indicated, the plaintiff . . . notified the Building Department . . . that his

> building was in a dangerous condition . . . However, it would seem to me that this is immaterial as there is no evidence that notice of the leak in the water pipes of the City was given to the Water Department. Further, there is no presumption that notice to the Building Department of a leak in the water line, under the evidence in this case, was by the Building Department communicated to the Water Department where it was no part of the Building Department's duty to receive and report such complaint to the Water Department." 52 A. 2d 68.

Appellant asserts (App. Op. Br. 64) error in treating the custom of municipalities as establishing a criterion of negligence or the lack thereof. This, again, is an unwarranted interpretation of the record. Appellant quotes from the trial court's opinion and states that the policy regarding buried pipe was the only evidence offered by way of defense. This is not the case; there was much evidence offered to show that it could not be told by visual observation whether pipe had graphitized; that the only way one could tell would be to completely expose the pipe along its entire surface, and that this was uneconomical, unrealistic, unsafe and impractical. The court never ruled or found (and the City has never contended) that custom was conclusive as to whether due care had been exercised; but it is contended that it is relevant evidence of the standard which should obtain.

Appellant *has never suggested* what more should have been done to constitute due care. It is clear there was no practical method of testing the pipe without completely taking the entire line out of service. It is clear that ordinarily cast iron pipe has a life far in excess of 42 years, and the practice throughout the country (as evidenced

by the many decisions cited in Appendix C) of leaving mains in service until trouble can be reasonably anticipated or a danger signal appears, is considered to be consistent with ordinary standards of care. A water pipe is not a dangerous instrumentality so as to require one to be constantly on the alert against injuring the property of another. Water pipes, mains, valves and joints frequently leak, but damage is the exception rather than the rule, particularly with respect to pipes buried 9 feet underground.

As stated in *Williams v. Long Beach,* 42 Cal. 2d 716, 718:

> "* * * There was testimony that no practical method was available to test the amount of strain on the pipe without taking it completely out of service and that there was no known practice of testing such pipes for strain while they are still in place."

In *Anderson v. County of Santa Clara,* 174 A. C. A. 171 (Sept. 30, 1959), which involved a claim of negligence in burning of brush cuttings, it is held:

> "* * * There was evidence that this method of burning was standard approved practice. * * * Such evidence would support an inference of non-negligence upon the part of the county employees." 174 A. C. A. 173.

The rule is stated in 2 *Witkin, Summary of California Law,* pages 1764-1765, as follows:

> "Evidence of custom or usage in a business or industry, i.e., the practice of others similarly situated or performing similar acts under similar conditions, is admissible in negligence cases on the issue of what constitutes due care or negligence under the circum-

> stances. * * * However, while the conduct or custom of others is evidence of the nature of a thing or of conduct as safe or dangerous, and is therefore *admissible,* it does not, as a matter of *substantive law,* conclusively establish a legal standard of due care."[13a]

Appellant cites (App. Op. Br. 65) *Polk v. Los Angeles,* 26 Cal. 2d 519, which involved failure to maintain proper insulation on a dangerous, high tension electrical line. This line was not buried or covered, but was readily available for inspection. Defendant admitted it took no precaution to protect persons who it should have anticipated might come in contact with it (26 Cal. 2d 529).

Complete Service Bureau v. San Diego Medical Society, 43 Cal. 2d 201, and *Sheward v. Virtue,* 20 Cal. 2d 410 (App. Op. Br. 65), are clearly distinguishable on their facts. Neither holds that evidence of the practice of others in the industry is not a proper matter to be considered in determining the presence or absence of negligence.

Appellant cites (App. Op. Br. 67) the testimony of its discredited witness, Brennan, that the P. G. & E. would rather pay damages than replace its pipe [R. 369]. Brennan was not connected with either the legal or claims departments of P. G. & E., and he was in no wise qualified to speak on the matter of handling P. G. & E. damage claims. Concerning this, the trial judge said:

> "That might be a policy of the P. G. & E. I never knew P. G. & E. to be a Santa Claus". [R. 488].

[13a]Accord, Prosser on Torts (1941 ed.) 239-240.

In any event, there is nothing of record to show that the P. G. & E. "policy" was typical of the practice generally prevailing.

Appellant fails to discuss any of many decisions, both in California and throughout the United States, which expressly hold that the mere passage of time in respect to installation of underground water pipe does not create negligence on the part of the operator of the pipe line prior to some notice or knowledge that a defect existed—none of which was shown here insofar as the Harbor Department was concerned. And the entire experience of the Harbor Department and the Water Department, insofar as the pipes on Signal St. and Pier 1 are concerned, was one of satisfaction, with no breaks from graphitic corrosion during the prior period from 1914 to 1956 with the exception of one break from corrosion (type not defined) occurring in 1926 under Municipal Warehouse No. 1 [R. 256-258; 436].

Appellant cites (App. Op. Br. 71) *Redfield v. Oakland, etc., Ry. Co.,* 112 Cal. 220. The facts are wholly dissimilar; the operator of a one-man streetcar jumped off the car while it was moving to change a trolley switch; the operator fell down and was unable to catch up with his car, as a result of which it ran away and killed plaintiff's wife. In such factual setting, it was held that opinion evidence that one-man car operations were not negligent was inadmissible, even though other railways operated one-man cars. The operation of a moving vehicle and the maintenance of a pipe buried 9 feet under-

ground are hardly analogous. In view of the many buried pipe cases available, it would seem that the *Redfield* case has no bearing on this case.

And the argument (App. Op. Br. 72) that the facts here are analogous to a decrepit roof, or worn automobile brakes or tires, wholly misses the point. Such matters can be readily inspected and their condition ascertained. Here, the evidence is conclusive that there was no practical method of testing the pipes without opening the entire line, exposing it both top and bottom, breaking the cement platform and digging a hole about 10 feet deep; even then, mere visual inspection would not suffice because a pipe subject to graphitic corrosion retains its size and contour; every inch of pipe would have to be tested. The trial court said:

> "The removal of earth beneath the pipe would remove its support, put a strain upon the pipe itself, might cause a sinking or bending of the pipe, occasioning damage more extensive than the corrosion itself." 168 Fed. Supp. 349.

The factual showing is even stronger than that in *Williams v. Long Beach,* 42 Cal. 2d 716, 718, *ante,* p. 17.

II.

The Pipe Line System Was Used Solely for Fire Fighting Purposes—a Governmental Function—and Plaintiff Failed to Establish the Requisites for Liability, Even Assuming That Negligence Existed. Accordingly, Governmental Immunity Attaches.

It was stipulated that the line was used solely for fire fighting purposes [R. 183], and the Court so found [R. 101]. Undisputed testimony also established that this was the only function of the system [R. 151; 434-435].

What constitutes a governmental function is stated in *Chafor v. City of Long Beach,* 174 Cal. 478, 487:

> "* * * Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, *to prevent fire,* the caring for the poor and the education of the young; and in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle."

In *Talley v. Northern San Diego Hospital Dist.,* 41 Cal. 2d 33, operation of a county hospital is held to be a governmental function, the court saying:

> "* * * Neither is the profit or nonprofit phase of the activity engaged in determinative of either a proprietary or a governmental function. * * * The test is whether *the particular activity* in which the governmental agency is engaged at the time of

the injury is of a public or a private nature. The agency may be authorized to act in both capacities." 41 Cal. 2d 39.

In *Denning v. California,* 123 Cal. 316, plaintiff, night deck hand on a vessel operated by the State Board of Harbor Commissioners, was injured due to negligent failure to properly secure a ladder. The vessel was used in a dual capacity, in the daytime engaging in towing and attending fires but at night engaging only in fire prevention. Plaintiff's injury was at night. In reversing a judgment for plaintiff, the court held:

"* * * But even if it were true that insofar as the duties of the board were those of a wharfinger, and that the liabilities of the State to its employees are or should be the same as that of a private corporation engaged in the same business, it does not follow that the State is or would be liable to the plaintiff inasmuch as he was employed in a distinct branch of the service, viz., the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of municipal corporations, in the exercise of some of which the corporation is liable for negligence, whilst in the others it is not." 123 Cal. 322.

In *Stang v. City of Mill Valley,* 38 Cal. 2d 486, 488, it was held:

"The determinative question is whether plaintiff's allegations constitute a cause of action against de-

> fendant. It is conceded that fire fighting is a governmental function . . ., that in the absence of statute, neither a municipality nor its officers are liable in tort for failure to discharge a duty arising from a governmental function."

While it may be conceded that the operation of a transit shed is a proprietary activity, it does not follow that the operation of a fire prevention system located outside the shed is a proprietary one. Appellant has cited no case which so holds.

In *Guidi v. California,* 41 Cal. 2d 623, the court emphasized that whether governmental immunity exists *depends on the nature of the activity*—not upon the identity of the subdivision carrying on the activity or the fact that the facility may also be used for some other purpose. The court held:

> "* * * Governmental immunity, however, turns on the nature of the particular activity that leads to the plaintiff's injury, not on the identity of the governmental subdivision * * * or on the fact that the facility in question may also be used for governmental purposes. * * * Thus, in *People v. Superior Court, supra,* 29 Cal. 2d 754, we held that the State Belt Railroad was operated by the State Harbor Commission in a proprietary capacity, although that agency prevented and extinguished fires on the waterfront in its governmental capacity. * * * Similarly, in the present case we are not concerned with the possible immunity of the state from liability for negligence in connection with agricultural and educational activities at the state fair, but only with its claim of immunity for negligence in the course of setting off fireworks and maintaining the horse arena." 41 Cal. 2d 625.

In that case the court held that setting off fireworks and maintaining a horse arena was a proprietary function; the situation here is precisely the opposite; the injury resulted from a governmental function, namely, the bursting of a fire prevention line; it did not result from negligence in the operation of the transit shed.

Other decisions recognizing this distinction are:

Davoust v. Alameda, 149 Cal. 69, 70;

Ravettino v. City of San Diego, 70 Cal. App. 2d 37, 43;

Rhodes v. Palo Alto, 100 Cal. App. 2d 336, 341.

In 8 *McQuillin, Municipal Corporations* (3d Ed.), page 212, the rule is stated as follows:

> " 'The liability or non-liability of a municipality for its torts does not depend upon the nature of the tort, the relation existing between the city and the person injured, or whether the city was engaged in the management of tangible property, but depends upon the capacity in which the city was acting at the time.' "

Appellant cites (App. Op. Br. 39) four out-of-state cases which it contends hold that operation of a water system is a proprietary function where the water is used for a warehouse sprinkler system. We are not dealing with a warehouse sprinkler system, but with a fire fighting system that is used for the general protection of the area [R. 101]. Appellant again abstains from summarizing the facts or quoting from these cases. Appellee has read them and believes they are clearly distinguishable. They might well be ignored for, as held in *Benton v. City of Santa Monica,* 106 Cal. App. 339 (where plain-

tiff was injured on a portion of a municipally operated beach near which was a pier that the City leased out for proprietary purposes):

> "* * * Whatever the law may have been declared to be in other states is wholly immaterial. . . . There is nothing in the appellant's amended complaint showing that the City of Santa Monica was exercising any functions over the portion of the beach belonging to the city, in any proprietary capacity whatever. The fact that other portions may have been leased for revenue purposes, or the fact that the City may have built a municipal pier, tends in no degree to establish any proprietary activity over what appears to be an unleased and open portion of the beach to which the public may have been invited." 106 Cal. App. 342-343.

Notwithstanding, we will indicate the distinction between Appellant's cases and the one at bar.

In *Richmond v. Virginia Bond & Warehouse Corp.*, 138 S. E. 503 (Va.), it was held that the operation of a water department for supplying water for domestic and commercial purposes was a proprietary activity and the fact that the water might be used by the water department's customer for fire fighting did not change the status of the water department (138 S. E. 506). In that case the warehouse company bought the water from the City. Here, the Harbor Department bought the water from the Water Department for the *sole* purpose of fire prevention, and it was the Harbor Department's water that escaped from the Harbor Department's pipe. Furthermore, the negligence provided in the Virginia case was the failure of an employee of the water department to

cut off the water (138 S. E. 507). An excerpt further distinguishes the case:

> "* * * Such installations, *when not required under police regulations,* are made by municipalities in their private or proprietary capacity. In the instant case, the sprinkler was being installed by the plaintiff [*a private corporation*] for its private protection against fire. * * * It was not installed by the compulsion or at the instance of the City." 138 S. E. 507.

In our case, ultimate jurisdiction of this fire line was vested in the Fire Department of the City which, under *Los Angeles Charter,* Section 130, had the power and duty to control and extinguish fires and to enforce all ordinances pertaining thereto:

> ". . . within the City of Los Angeles, including the waterfront of the city, and the waters under the jurisdiction of the city, and vessels or structures thereon."

Section 5703 (F)(1), *Los Angeles Municipal Code* [Ex. O], vests in the Fire Chief supervision over the following fire fighting appliances:

> ". . . (d) Interior and exterior standpipes, *water supplies thereto* and name plates therefor; . . . (e) steamer connections for sprinkler system, *water supplies thereto,* signs and name plates therefor; . . ."

And Section 91.0506 of Los Angeles Municipal Code [Ex. R] commands that a building such as Transit Shed 59 and having in excess of 12,000 square feet *must* have an automatic sprinkler system. (Berth 59 was ap-

proximately 60,000 square feet [R. 421-424].) Thus, these water mains were maintained and used under compulsion of city ordinances and subject to the superior authority of the Fire Department.

In *Dunston v. New York,* 86 N. Y. S. 562, the City had actual notice for several days that an exposed pipe was leaking and was improperly supported. The opinion recognizes that in a factual setting such as we have here the function would perhaps have been governmental, the court saying:

> "If the City maintained a separate water system for the fire department, and the break occurred in such a pipe, it may be that it could not be chargeable with negligence concerning the construction or maintenance of the same; but that is not this case, and need not be decided. Here the fire hydrants are connected by lateral pipes with the mains which are used for supplying the City and inhabitants with water, and from which the City receives a revenue. It is clear I think that for negligence in not repairing a water main proper, or a service pipe which is used for other than fire purposes, the City would be liable for any damages directly and proximately attributable to such negligence." 86 N. Y. S. 566.

In *Boyle v. Pittsburgh,* 21 A. 2d 243 (Pa.), the leak had existed for seven weeks and the City had actual notice of it but neglected to inspect or repair. The broken pipe was part of the "regularly constituted water system of the municipality which was used for supplying water. * * * It was all one system." (21 Atl. 2d 243.)

Here, after the water passed through the check valve as it left the Water Department's 10 inch line it became

the property of the Harbor Department and was effectively sequestered for all time. It was used for nothing but fire fighting purposes; it was not used for toilets, washrooms or drinking fountains [R. 435].

Blake-McFall Co. v. Portland, 135 Pac. 873 (Ore.), is contrary to California decisions; in addition, there was but one system and it was used indifferently and interchangeably for both selling water and fire fighting. Furthermore, the fire department had *no* control over the system as it did in our case. The court said:

> "We are not called upon to decide whether the City would be chargeable with negligence in the construction of a separate water system to be used exclusively for fire protection." 135 Pac. 874.

Notwithstanding the stipulation, the Finding and the uncontradicted evidence that this line was used for nothing but fire fighting purposes, and the circumstance that the line was not inside a warehouse where plaintiff's goods were located but in a street, buried under a loading dock, Appellant argues that liability exists by virtue of *Government Code,* Section 53051, which imposes liability upon a municipality:

> ". . . if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition.
>
> "(b) For a reasonable time after acquiring knowledge or receiving notice failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

This statute (Public Liability Act) is in derogation of the common law rule of immunity and is strictly construed against claims asserted against the municipal body.

In *Hoel v. City of Los Angeles,* 136 Cal. App. 2d 295, 303-304, the court held:

> ". . . the statute is in derogation of the common law rule of no liability for malperformance of a governmental function, and is to be strictly construed."

To the same effect:

> *Whiting v. City of National City,* 9 Cal. 163, 165;
> *Allen v. City of Los Angeles,* 43 Cal. App. 2d 65, 68.

One asserting the statute has the burden to prove the elements necessary to impose liability. In *Dineen v. San Francisco,* 38 Cal. App. 2d 486, 491, the court held:

> "* * * It is the general rule that in actions under the Public Liability Act it is incumbent upon the plaintiff to plead and prove the dangerous and defective condition of the property, knowledge on the part of some officer or agent of the defendant who possesses the power to rectify the condition, and neglect to repair within a reasonable time after notice."[14]

One invoking the statute must prove that notice of the defective or dangerous condition has been brought to the attention of the "legislative body, board or person authorized to remedy the condition," and a failure to remedy the defect within a reasonable time after acquiring such

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[14]Although the Second Amended Complaint alleges delay in repairing promptly, this was abandoned at the trial in the face of the showing that, within 45 minutes after the Harbor Department learned of the break, the plumber foreman dressed, drove from his home to Pier 1, and turned off the water [R. 187-8]. The Court found there was no delay or negligence resulting therefrom [R. 102-3; Findings 10 and 11].

notice. In this case, the "board" authorized to remedy a defect in the pipe was the Board of Harbor Commissioners. Sections 70 and 71 *of the Los Angeles City Charter*[15] created the Harbor Department, and provide that the Department shall be managed by a "board of five Commissioners." Section 138 vests the Commissioners with "management, supervision and control" of the tidelands; Section 139(g) requires the Commissioners to "maintain and operate" all harbor facilities; Section 141 vests the General Manager of the Harbor Department with supervision and management of "all construction and maintenance work authorized or ordered by the Board."

Appellant ignores (App. Op. Br. 73 *et seq.*) the requirement that the notice required under the Public Liability Act must be brought to the party having the duty to correct, *i.e.,* the Harbor Department. Notice to the Water Department concerning soil conditions in the area (absent a showing that such was brought to the attention of the Harbor Department) is immaterial as the Water Department is not authorized to maintain pipe under the jurisdiction of the Harbor Department. The Water Department is created by Section 70 *of the City Charter,* and its powers defined in *Sections* 218-229 thereof.[16] The Charter makes clear in Sections 77-80 that each department has complete autonomy (subject to control of the City Council) over matters committed to its jurisdiction.[17] Section 78 in part provides:

> "The board of each department shall have power . . . to supervise, control, regulate and manage the department. . . ."

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[15]Appendix B, pp. 7 to 8.

[16]Appendix B, pp. 7 to 8.

[17]Further indication of the independence of these departments is recognized in *Douglass v. Los Angeles,* 5 Cal. 2d 123, 134-5.

Further indication of the autonomous nature of the Harbor Department and the Water Department is found in Section 51(6), which provides:

> "The powers and duties of the City Administrative Officer and the provisions of this section shall not extend or apply to the Departments of Water and Power, Harbor, or Airports."

And the general City budget does not apply to the Harbor Department or the Department of Water and Power, which are given control of their own funds (Sec. 345).

Hoel v. Los Angeles, 136 Cal. App. 2d 295, holds that notice to one city department is not notice to another, within the requirements of the Public Liability law. There, plaintiff was injured because of malfunctioning of an intersection traffic signal. The Police Department had actual notice of the defect, but the authority to repair was vested in the Board of Traffic Engineering Commissioners (now called the Department of Traffic; Sec. 245 *et seq., Los Angeles City Charter*). The holding negates any contention that notice of defects in the pipes of the Water Department, or notice to it of soil conditions in the area, was notice to the City that similar conditions might exist in the pipes of the Harbor Department within the meaning of Section 53051 *of the Government Code.* The court held:

> "* * * The knowledge or notice must reach the body, board or person authorized to remedy the condition. * * * Under the evidence heretofore discussed, a police officer not only has no authority to do more than afford temporary protection against a known defect in the signal, but he is instructed to

> do no more than that. * * * Authority to take temporary measures to guard against a dangerous or defective condition in an emergency might be attributed to many servants of the city who had no authority to remedy the condition by removing it. But notice to such persons is not the notice the statute prescribes as a prerequisite of a duty to act. * * *" 136 Cal. App. 2d 304, 306.

Continuing, the court held:

> ". . . actual notice must be given to one having authority to remedy or to an employee charged with the duty of communicating same to a person having authority to remedy, and notice to any other employee (not charged with such duty) does not count unless actually passed on to the person in authority." 136 Cal. App. 2d 312.

To the same effect:

Goodman v. Raposa, 151 Cal. App. 2d 830, 834;

Loewen v. City of Burbank, 124 Cal. App. 2d 551, 553.

Appellant argues (App. Op. Br. 73-76): (1) that when a condition involves an unreasonable risk of injury it is a dangerous condition within the meaning of the Public Liability Act, (2) that such dangerous condition may be found in the general plan of operation, and (3) that actual knowledge is not required—merely constructive knowledge—if the defect is one that could be reasonably anticipated. These factual assumptions were all resolved against Appellant.

Again we turn to Appellant's cases and point out their distinguishing features. Preliminarily, it seems that a

water pipe system consisting of over 10 miles of 6, 8 and 10 inch buried pipe, substantial portions of which have been in use since 1917 without any trouble from graphitic corrosion [R. 436; Ex. S], cannot fairly be characterized as constituting a dangerous or defective condition, or a plan of operation that has subsequently become inherently dangerous through changed circumstances of which the City had knowledge. The trial court did not find that the condition here existing involved any unreasonable risk of injury to the public. As said in *Hawk v. Newport Beach* (App. Op. Br. 73), 46 Cal. 2d 213, 217:

> ". . . each case must be determined upon its own peculiar facts."

In that case the question was whether rocks located in a cove at a bathing beach used by the public constituted a dangerous condition. *It was held to be a question of fact on which reasonable men might differ.*

In *Carr v. San Francisco* (App. Op. Br. 74), 170 A. C. A. 54, the court affirmed a judgment of nonsuit in favor of the municipality as against a claim for injuries suffered by a boy when he tripped over an attendant in charge of a playground merry-go-round.

There are no facts in this record to show that the general plan of operation resulted in a dangerous or defective condition. The operating results over a period of 40 years belie such a claim.

The distinction between *McAtee v. Marysville,* 111 Cal. App. 2d 507, and the case at bar is apparent by the excerpts from the opinion, wherein the court notes that the engineering department of the city (which had jurisdiction of the matter) knew at all times that the sewer line was not designed or intended to operate under pressure

and that the City Engineer knew of the existence of pressure prior to the accident (111 Cal. App. 2d 510, 513)

The facts in *Fackrell v. San Diego,* 26 Cal. 2d 196, are wholly dissimilar. The city had improved a dirt street by spraying road oil on it and on an adjacent dirt crubing, between the dirt curbing and a steep hillside was a 10 foot dirt sidewalk; while spraying the roadway and curb, a portion of the oil was accidentally *but to the knowledge of the Street Superintendent* sprayed onto the dirt sidewalk a width of perhaps 18 inches. The City authorities permitted this coating to remain on the sidewalk; this created the "appearance of a paved sidewalk" (26 Cal. 2d 200). Two months later heavy rains eroded the dirt portion of the sidewalk but left a strip about 30 inches wide next to the curb, which appeared to be intact and usable. The strip included the oiled surface portion of the sidewalk. Actually, the rains had undermined the earth under this thin oiled strip and, when plaintiff walked on it, the surface crust gave way and she was injured. The City Street Maintenance foreman conceded there was bound to be considerably more erosion on a hill than on a level ground, and that the unimproved dirt sidewalk would be particularly subject to erosion (26 Cal. 2d 201-202). The trial court made the following finding:

> "* * * [the City] had improved the street and sidewalk by grading the sidewalk and street and oiling the same and that by reason of said work the sidewalk and street was [*sic*] left in a condition which was inherently dangerous; that said inherently dangerous condition was known to the defendant. * * *" 26 Cal. 2d 202.

How different are these facts from the Findings and the record here. There is no evidence or finding that the Harbor Department either created or knew of an inherently dangerous condition. It is a far cry from a sidewalk visible to all and a pipe buried 10 feet underground, which has performed perfectly for many years. The statement regarding constructive notice must be considered in the light of these wholly different facts and the Findings of the trial court in our case.

A factual situation more analogous to that involved here is found in *Cheyney v. Los Angeles,* 119 Cal. App. 2d 75. Plaintiff at night walked down steps to a beach maintained by the City; it was dark and there were no lights or fires; a stairway led from a parking lot to the beach and had 23 steps with a handrail extending to the last few steps. The last step was 29 inches from the sand according to measurements made two days after plaintiff's injury; plaintiff took the last step, fell to the sand and was hurt. The supervisor of the beach area, whose duty it was to protect visitors and keep the stairway in repair, had no knowledge that the sand level was at any time below the bottom level of the bottom step of the stairway, although the waves and tides varied the sand level as much as five feet within a period of twenty-four hours. Affirming a judgment of nonsuit, the court held:

> ". . . before a defendant municipality may be charged with constructive notice it must have existed for a sufficient length of time and be sufficiently conspicuous or notorious to give rise to the inference that defendant had knowledge thereof. * * * In the instant case there is no evidence that the alleged defective condition was either conspicuous or notorious, or as to how long it had existed." 119 Cal. App. 2d 77.

Here there is no evidence that the defect in the pipe was conspicuous or notorious; nor is there any evidence as to how long the condition which led to its bursting had existed.

In *Dineen v. San Francisco,* 38 Cal. App. 2d 486 (involving collapse of a courtroom chair), it was held that the doctrine of constructive notice does not apply except to patent defects or defects arising from original negligent installation, the court saying:

> "Appellant next contends that constructive notice is sufficient under *some* circumstances to impose liability under the Public Liability Act. This is undoubtedly the law. * * * Under these cases, long continued existence of a patent defective condition may establish constructive notice thereof. These cases go no further, however, than to hold that if the evidence shows that the dangerous condition is long continued and patent the governmental agency cannot successfully contend that it was not aware of it. In the present case, it is contended that the defect is one which would have been discovered had the respondent exercised reasonable care in inspecting the seats. The cases do not support such extension of the rule. Moreover, not only is this theory not pleaded in the complaint upon which the action went to trial, but it was refuted by the evidence. The evidence produced by plaintiff demonstrated that the accident occurred by reason of the fact that a nut on a bolt that supports the seat of the chair had become unscrewed. There was not one word of testimony as to how long this condition had existed, nor that the nut and bolt were in such a condition that a reasonable inspection would have disclosed the condition." 38 Cal. App. 2d 491.

III.

The Exculpatory Clause in the City's Tariff Exonerates the City From Liability Even Though Negligence Were Established.

As a second and third affirmative defense, the City pleaded an exculpatory clause contained in its tariff and alleged that plaintiff was aware of and subject to the provisions thereof, although the agreement between the City was with Grace Line, Inc., a separate corporation, as preferential assignee of Berth 59 [R. 10-14]. In view of its other findings, the trial court made no finding concerning the matters alleged in the second and third defense [R. 106, Find. 27].

Notwithstanding that the trial court made no finding on these defenses, it is submitted that the judgment can be sustained upon the basis of such defenses.

Item 535(b) of the City's tariff [Ex. B] provides:

> "Neither the Board nor the City shall be responsible or liable in any manner or degree for any loss or damage to any merchandise or other property of any description stored, handled, used, kept or placed upon, over, in, through, or under any wharf or other structure or property owned, controlled or operated by the Board or the City occasioned by or on account of pilferage, . . . seepage, leaky containers, . . . leakage or discharge from sprinkler system, . . . or from any cause whatsoever, except to the extent that responsibility and liability shall be, regardless of above limitations, absolutely imposed by operation of law."

It is settled in California and elsewhere that an exculpatory clause of the type here involved, although strictly construed, is valid and enforceable.

Stephens v. Southern Pacific Co., 109 Cal. 87, 89;

Fields v. Oakland, 137 Cal. App. 2d 602, 608-609;

Inglis v. Garland, 19 Cal. App. 2d (Supp.) 767, 773;

Werner v. Knoll, 89 Cal. App. 2d 474, 475-476;

R. H. Macy & Co. v. Fall River, 83 N. E. 2d 880, 881 (Mass.);

Bigelow v. Boston, 149 N. E. 540, 541 (Mass.);

Manius v. Housing Auth. of Pittsburgh, 39 A. 2d 614, 615-616 (Pa.).

Presumably, it will be pointed out by Appellant that it did not sign the preferential berth assignment but that it was signed only by Grace Line, Inc. [Ex. D]. However, if Appellant's use of Berth 59 was with the consent of the Harbor Department such use was authorized only because of the preferential berth assignment agreement. If Appellant was not using it pursuant to such agreement, its use was unlawful and it was a trespasser or gratuitous licensee. In either event, the City would owe no duty to Appellant except to abstain from active negligence.

Item 1235 of the Tariff [Ex. T] makes it unlawful to use the berth without an assignment or other permission. This section reads:

> "It shall be unlawful for any person to . . . use . . . any berth, wharf, wharf premises, or other area under the jurisdiction of the Board without first securing an assignment or other permission. . . ."

There is nothing in this record to show Appellant's right to use the transit shed unless it was by virtue of the preferential berth assignment between the City and Grace Line, Inc.

In *Palmquist v. Mercer,* 43 Cal. 2d 92, plaintiff, who was on premises either as a licensee or trespasser, was injured due to a defect in a trestle maintained thereon by Union Oil Company. The trial court granted a nonsuit and, in affirming a judgment of dismissal, the court held:

> "Nor does it appear that Union Oil Company breached any duty owing to plaintiff by reason of its maintenance of the trestle. In exercising its right to maintain the trestle, Union Oil Company was acting by express permission of the Flood Control District, like the holder of a franchise. * * * As such, its status was akin to that of the legal possessor of property, having no greater duty or obligation than the landowner with respect to the condition of the property in relation to a person coming on the property either as a trespasser or licensee. * * * In other words, Union Oil Company was using the premises as a matter of right as against plaintiff's use by sufferance; and whether plaintiff be viewed as a trespasser or a licensee, the Union Oil Company owed him only the duty of refraining from wanton or wilful injury. * * *" 43 Cal. 2d 101-102.

The same rule is applied to a social guest in one's home in *Free v. Furr,* 140 Cal. App. 2d 378, 383.

IV.

The Admission of the City's "Additional" Answer to Plaintiff's Interrogatories Was Not Erroneous or Prejudicial.

Finally, Appellant urges (App. Op. Br. 76-80) that prejudicial error was committed by the reading in evidence of the City's additional answer to an interrogatory propounded by plaintiff.[18] This additional answer was read into evidence by plaintiff—not by the City—although it was read over plaintiff's objection. However, plaintiff voluntarily read the original answer to Interrogatory No. XIV(b) [R. 156-157] which stated that the Harbor Department prior to March, 1956, had had two failures of cast iron water pipe caused by corrosion. Long prior to the trial, the City voluntarily filed a correction to this answer, explaining that the two failures resulted from a sheer and a break in a leaded joint [R. 39].

Appellant's contention, irrespective of its merit, is answered by the circumstance that in addition to the answer to the interrogatory concerning which complaint is made there was positive testimony by the City's plumber foreman, Brashier, that there had been no corrosion failure in this entire Harbor Department pipeline system other than the one at the south end of Pier 1 under Municipal Warehouse No. 1 which occurred in 1926 [R. 435-436]. Appellant had ample opportunity to cross-examine Brashier and such other City personnel as it saw fit. Thus, we may ignore the additional answer concerning

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[18]This matter is in the Record, pp. 155-165.

which Appellant complains, and there still remains record support for the Court's finding that the City did not know or have notice or knowledge that this pipe was subject to failure from graphitic corrosion.[19] The matter is probably covered by *Thompson v. Baltimore, etc., Railroad Co.,* 155 F. 2d 767 (8th; cert. den. 329 U. S. 762), where the court held:

> "* * * The rule, however, is that, in a case tried to the court without a jury, the admission of incompetent evidence does not render the findings erroneous where there is substantial competent evidence to support them. 'The presumption is that the trial court considered only the competent evidence and disregarded all evidence which was incompetent.'" 155 F. 2d 771.

The same rule is stated in *Robey v. Sun Record Co.,* 242 F. 2d 684 (5th; cert. den. 355 U. S. 816), where the court held:

> "* * * In any event there was other evidence to the same facts so that if it were error to admit these journals it would be harmless and it is to be presumed that the court disregarded all incompetent evidence. * * *" 242 F. 2d 689.

And in *Lobel v. American Airlines,* 192 F. 2d 217 (2d; cert. den. 342 U. S. 945), the court held:

> "Plaintiff was allowed to read to the jury his own answers to defendant's interrogatories about the extent of his injuries. These answers were self-serving and should not have been admitted. * * * Here the error was harmless since plaintiff had already testified directly to the same effect." 192 F. 2d 221.

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[19] *Cf.* Rule 61, F. R. C. P.

Further, the matter is not resolved so simply as Appellant asserts (App. Op. Br. 78) by the holding in *Haskell Plumbing & Heating Co. v. Weeks,* 237 F. 2d 263 (9th). In that case, the adverse party did not seek to use a portion of the interrogatories but the answering party sought to use them affirmatively. This was held error not only in view of the fact that the answers were self-serving, but also because the trial court refused to permit the adverse party to cross-examine the answering party (237 F. 2d 266-267).

Appellant ignores the fact that it was the one who originally sought to read the City's answers concerning prior corrosion breaks. It was the City's contention that in view of the fact that plaintiff read one answer on such subject the City was entitled to read any other of its answers which were explanatory or a correction of those read by plaintiff [R. 156, 161-162]. This was what the trial court permitted. Such practice seems authorized by the Federal Rules although Appellee has not found a case specifically in point.

Rule 33 provides:

> ". . . and the answers [to interrogatories] may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party."

Rule 26(d)(4) reads:

> "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

This would seem clearly to mean that if one party elects to read the other party's answer to an interrogatory, the answering party would be entitled to have read an explanation or correction of that answer which relates to the same subject matter. Such procedure seems consistent with fair play and common sense; any witness is entitled to explain or correct a prior answer. This corrected answer was filed July 15, 1957 [R. 56], nearly 15 months before the trial commenced [R. 99]. Plaintiff had ample time to submit additional interrogatories or to take further depositions, if it wished, to ascertain the reason for the corrected answer. It was at no time surprised or deprived of the right to cross-examine any City official or employee. This evidence was admitted during Tuesday morning, the first day of the trial [R. 163-165; 169] and although the trial continued until noon of the following Friday [R. 453; 490], appellant made no request to interrogate any witness concerning the corrected answer.

Conclusion.

In summation and conclusion, the judgment should be affirmed for the following reasons:

1. No negligence has been proved;

2. The burst pipe was used solely for a governmental function, namely, fire prevention, and Appellant has failed to establish facts necessary to make the provisions of the Public Liability Act applicable;

3. The exculpatory clause is operative;

4. Appellant, if not bound by the exculpatory clause, had only the rights of a gratuitous licensee or trespasser

and, in such case, no duty was owed to it except to abstain from active negligence.

Respectfully submitted,

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APPENDIX "A."

Authorities Relative to Interpretation of Findings.

Rule 52(a), *F. R. C. P.*, provides:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Randall Foundation v. Riddell, 244 F. 2d 803, 805 (9th):

> "Furthermore, the appellate court would assume thereby the power of making findings of fact, which passed out of the federal system with the abolition of trials de novo. The appellate courts of the federal system have such power neither inherently nor by grant, express or implied. The Rules say that the findings of fact of the trial judge shall not be set aside unless clearly erroneous and no exception is made as to facts found based upon writings."

Glens Falls Indemnity Co. v. United States, 229 F. 2d 370, 373 (9th):

> "An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous. Appellant has not carried the burden as to any particular challenged findings sufficiently to require or justify a detailed analysis of the evidence, particularly in view of the exhaustive study and discussion of the facts contained in the trial court's written memorandum."

Carr v. Yokohama Specie Bank, 200 F. 2d 251, 255 (9th):

> "Where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that court to choose between two permissible and conflicting views as to the weight of the evidence. * * * We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the findings of fact are not clearly erroneous."

Faivret v. First National Bank, 160 F. 2d 827, 829 (9th):

> "From an examination of the record, it is clear that the trial court based its conclusion largely upon an evaluation of the testimony given, much of it being conflicting. * * *
>
> "This Court has repeatedly held that, under such circumstances, it would not be inclined to disturb the findings of the lower court."

Tonkoff v. Barr, 245 F. 2d 742, 750 (9th):

> "* * * a trial court might have reached a conclusion different from that reached by the trial court below, but we are not left with the definite and firm conviction that a mistake has been committed. * * *
>
> "The foregoing references to the testimony make it apparent that there was substantial evidence upon which the trial court properly could make the findings he did. His short but revealing memorandum decision indicates that the trial judge considered the

motives and other indicia of credibility as applied to the various witnesses and was impressed with that evidence which sustained appellees' position. Under such circumstances it is not our function to substitute our judgment for that of the trial court."

Wilson v. New York Life Insurance Co., 250 F. 2d 649, 651 (8th):

"The findings of the court are presumptively correct and will not be set aside unless clearly erroneous. * * * The defendants were the prevailing parties and, hence, we must take that view of the evidence most favorable to them. They are entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proven and if, when so viewed, there was substantial evidence to sustain the findings then the judgments may not be reversed by this court unless against the clear weight of the evidence, or unless influenced by an erroneous view of the law."

Maryland Cas. Co. v. Independent Metal Products Co., 203 F. 2d 838, 841, 842 (8th):

"* * * This finding [of absence of negligence] of the court is presumptively correct and will not be disturbed unless clearly erroneous and it is not the function of this court to retry and redetermine the facts involved. * * *

"In considering the efficiency of the evidence to sustain the court's findings we must view the evidence in a light most favorable to defendant. * * *

"* * * Ordinarily the question of negligence is one of fact to be determined by a jury where the case

is tried to a jury, or by the court where the case is tried to the court without a jury. The burden of proof on this issue was on appellant and the finding of the court should not be set aside unless clearly erroneous."

Gibbins v. Utah Home Fire Ins. Co., 202 F. 2d 469, 473 (10th):

"Defendant contends that the evidence is insufficient to sustain the finding that the defendant negligently and carelessly used and operated the rig .* * *. We think it sufficient to say, without further review, that the evidence is sufficient to sustain the finding. * * * It is not our function to determine what the facts are or to determine the conflicts in evidence. We must accept the findings unless clearly erroneous."

United States v. Hill Lines, Inc., 175 F. 2d 770, 771 (5th):

"* * * It is sufficient for us to say of it that the record fully supports appellees' claim that the question of contributory negligence vel non was a question of fact and not one of law, and that it cannot be said as matter of law that the evidence demanded a finding of contributory negligence.

"It is a settled rule of law in Texas and elsewhere that the question of contributory negligence is usually a question of fact to be determined by the triers of the fact. It is rare that a finding on the issue is demanded as matter of law, and this case is no exception."

Herrin Motor Lines v. Jarvis, 156 F. 2d 276, 277 (5th):

"Whether or not the plaintiff's negligence was the sole proximate cause of the injury in this case is a question of fact which was resolved by the trial Judge against appellant with substantial evidence to support his conclusion. Our judgement should not be substituted for his."

Ohlinger v. United States, 219 F. 2d 310, 311 (9th):

"* * * Under the circumstances referred to in the rule, it is not necessary to file formal findings of fact and conclusions of law, but when the trial court *does make formal findings,* they alone serve as the court's findings of fact. In the words of the Supreme Court: 'We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings.' "

APPENDIX "B."

Excerpts From Los Angeles City Charter.

Sec. 51 (6). The powers and duties of the City Administrative Officer and the provisions of this section shall not extend or apply to the Departments of Water and Power, Harbor or Airports."

"*Sec.* 70. The following departments of the city government are hereby created:

* * *

Fire,

Harbor,

* * *

Water and Power."

"*Sec.* 71. Said above named departments shall each be under the control and management of a board of five commissioners. * * *"

"*Sec.* 78. The board of each department shall have power (subject to the provisions of this charter and to such ordinances of the city as are not in conflict with the grants of power made to each such department of the city government elsewhere in this charter), to supervise, control, regulate and manage the department * * *."

"*Sec.* 138. Subject to the provisions of this charter, the Board of Harbor Commissioners shall have the management, supervision and control:

(1) Of all navigable waters and all tidelands and submerged lands * * * at Los Angeles Harbor and within the limits of the City of Los Angeles; * * *"

"*Sec.* 139. The Board of Harbor Commissioners shall have power and it shall be its duty:

(g) To acquire, provide for, erect, maintain, and operate all such improvements * * * facilities and services as it may deem necessary or convenient for the promotion or accommodation of commerce * * *."

"*Sec.* 141 (a). The general manager of the Harbor Department * * * shall have power, and it shall be his duty:

* * *

(2) To supervise and manage all construction and maintenance work authorized or ordered by the board * * *."

"*Sec.* 220. The Department of Water and Power shall have the power and duty:

(1) To construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the city and its inhabitants with water and electric energy * * *"

"*Sec.* 345. * * * Such budget [the general city budget] shall not cover the operations either as to receipts or expenditures of the departments of the city government given control of their own special funds, as elsewhere in this charter provided: namely, the Harbor, * * * and Water and Power Departments * * *."

APPENDIX "C."

Authorities From Other Jurisdictions Holding That Failure to Dig Up and Inspect a Buried Cast Iron Pipe Is Not Negligence.

Brown v. Grand Rapids, 251 N. W. 561, 562-3 (Mich.)—Pipe buried four feet underground and burst after it had been installed for 33 years. Held:

> "The water was shut off almost immediately after the break was discovered. Shortly thereafter, when repairs were made, the lateral was found to be in good condition and, with the exception of a short piece removed in order to make a new connection at the point of breaking, the entire section remained in use for four years, after which time new developments made its replacement advisable. * * *
>
> * * *
>
> "Plaintiff falls back upon the contention that there were no proper tests or inspections conducted by the city, but suggests no reasonable tests or methods of inspection. The testimony reveals with certainty that there were no similar breaks in the near vicinity. If it was incumbent upon the city to make such tests and inspections as are demanded by plaintiff, at places where there had been no previous trouble, it would mean that the city would constantly be obliged to dig up its streets and inspect its water mains. The further question arises as to how frequently, in that eventuality, such inspection should be made. If the city should apply the knife test to all its mains after they were exposed by excavations, and a leak should occur shortly thereafter as a result of electrolysis, would the city be responsible for improper inspec-

tion? The expense of maintaining a system under those circumstances would be such as to make the cost of supplying water almost prohibitive."

Philadelphia Ritz Carlton v. Philadelphia, 127 Atl. 843, 844-845, (Pa.)—Break in pipe occurred because of a latent defect or flaw after the pipe had been installed 22 years. There had been some leakage in the area prior thereto which was repaired in the usual manner by attaching cast iron sleeve and caulking. Held:

"* * * Here, the defect was latent, and a reasonable examination, such as was given, did not disclose it. * * * There is nothing in this case to show a failure to adopt reasonable precautions to prevent breaks in the pipe, or, when repairs were made, that other than approved means were adopted to secure renewed safety. * * * Because the accident might have been prevented by adopting some special method or device, when such is not commonly done by reasonably prudent persons under similar circumstances, does not prove negligence."

Republic Light etc. Co. v. Cincinnati, 127 N. E. 2d 767, 772-773, (Ohio)—Cast iron water main broke after it had been in use for 55 years. The break was due to an erosion caused either by a "scouring" process or electrolysis caused by transient currents of electricity. Held:

"There was evidence that breaks in the various mains in the city occurred to the extent of 250 to 300 a year. The evidence fails to show (even if controlling) that such breaks were in mains similar to the one here involved, under similar pressure, of the same life, or in other ways identical in char-

acter with the main in question. It is questionable whether such evidence was even competent.

"It is the claim of the plaintiff that there was substantial evidence indicating that inspection could have been made which would have prevented the loss for which plaintiff seeks recovery. * * * It is sufficient to say that after examining all the evidence submitted, no substantial evidence appears justifying the conclusion that any feasible or reasonable method of inspection would have disclosed the imminence of a failure in the particular section of the main here involved.

"In addition, there was a complete failure in the attempt to show a standard of care employed by those situated similarly to the defendant. Proof of such standard of care is required. * * *

* * * * * * * *

"No evidence was submitted from which it could be concluded that the city should have been put on notice of the prospect of possible failure of the water main here involved. * * *

"The burden rests upon the plaintiff to show that its damage was the proximate result of the city's failure to inspect this particular main. It is not clear that had this main been exposed for inspection 10 days before the break that unless a most careful examination had been made of the exact spot where the leak occurred, the leak would have been prevented. Can it be that periodically (how often) the city is required to expose the miles of pipe employed and scrape or otherwise test each inch of each section of pipe, or not doing so, be compelled to respond in damages for the result of a leak, the imminence

of which it had not the slightest notice? Our answer is, that it is not so required.

"There is no evidence that any number of cities, similar to the city of Cincinnati, employ any methods of inspection which would have disclosed the imminence of a break such as occurred in the water main in question."

Taphorn v. Cincinnati, 122 N. E. 2d 307, 308 (Ohio)—Break in the city's water main which was installed in 1911; there had been no inspection since installation. Held:

"The burden of proof rests upon plaintiffs.

"The bursted section of main was not in evidence and there is no proof in the record as to its actual condition. The record does show that approximately five and one-half feet of the particular 12-foot length was removed and replaced by joining new main to the remainder of the original 12-foot length installation. There is no technical or expert testimony in the record as to the life of a cast iron water main, such as was installed here. Counsel argue a duty to inspect, but no standard or method in modern use by the ordinarily prudent city in the operation of a waterworks system is in evidence to guide the court or jury."

City of Richmond v. Hood Rubber Co., 190 S. E. 95, 98, 100 (Va.)—A city water meter installed in a box 18 inches under ground gave way after in use 12 years. Held:

"* * * The sole charge was the maintenance of a defective meter. There is no evidence which shows that the meter was improperly installed. It was placed

18 inches under the sidewalk, in the ground and in a regular meter box. There is no evidence which tells us that this was improper installation. * * *

"The meter was installed in 1922 and had been in continuous use. * * *It complied with the specifications of the American Water Works and the New England Water Works Associations. Approximately two million of them were in use at the time of the injury here. There being no wear upon that part of the meter where the leak occurred, its life is indefinite.

"There was an entire absence of any evidence which would show or even tend to show that the common usage or good practice of other municipalities or water companies engaged in a similar business, supplying a similar service under substantially similar conditions, required an inspection of a water meter after installation.

"Likewise, there was an entire absence of any evidence which tended to show the existence of a single circumstance or condition, which if followed would have disclosed the defect. *It would not be reasonable to hold the city liable for a failure to inspect its meters when it has not been shown either that good practice required an inspection or what would be a fair standard of inspection.* * * *

"The court below * * * charged the city with knowledge of the defect if it had existed for such length of time that the city through its officers should have acquired notice. We think the court was in error in so amending the instruction. A defect may have existed for a great length of time and could not have been detected by any kind of in-

spection. The instruction would charge the city with notice of latent and hidden defects in its water system. The test is not the length of time the defect may exist. It is, to use the language of the attorney for the city, 'the susceptibility to discovery' and the length of time the defect may exist that would be sufficient to charge the city with notice."

Midwest Oil Co. v. Aberdeen, 10 N. W. 2d 701, 704 (S. D.)—Gasoline station damaged by a break in the city's 10-inch water main. Held:

"We are of the opinion, further that any inference of negligence occurring following the installation of the main is rebutted by facts of record showing that the main was not subjected to any abnormal pressure and was of a type that should last for years in excess of the time this main was in the ground. There was no occasion for the city either to replace or inspect the pipe following its installation."

Da Prato v. Boston, 134 N. E. 2d 438, 439 (Mass.) —The cast iron water pipe was laid in 1892 and burst in 1948. Held:

"There was no evidence here that the pipe in question was not properly laid or that it was of a kind which after the length of time it had been in the street could not safely be used. It may be considered settled that reasonable care on the part of the city did not require the periodical digging up of the street for purposes of inspection."

Stein v. City of Newark, 52 Atl. 2d 66, 69 (N. J.)—Water leakage in the city's system. Held:

> "Now, another case I would like to call attention to is in Massachusetts, the case of *Gerard v. City of Boston,* 13 N. E. 2d 415, where the Supreme Judicial Court of Massachusetts said, 'We think that there was no evidence of negligence. The cause of the break is unknown.' There is no evidence in this case to indicate what caused this break. 'No negligence in laying the pipe or in maintaining it appears. There is no evidence that a pipe as old as this one (37 years) may not safely be used. The slight seepage which was noticed in the basement might have come from a variety of sources, some of which might not have been in the control of the defendant, and did not indicate a defect in the main. We think that due care did not require the defendant to expose and examine all the pipes at the intersection of the streets named.'"